PP

v.

MOHD AL FAISAL ABDUL RAHMAN

HIGH COURT MALAYA, MUAR
JEFFREY TAN J
[CRIMINAL TRIAL NO: 45-21-2001]
8 DECEMBER 2004

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1) - Trafficking in 634.58 grams of cannabis - Only 13.58 grams of drugs in custody and control of accused - Whether insufficient to support a case of trafficking - Whether could only be guilty of unlawful possession*

EVIDENCE: *Statement - Cautioned statement - Admissibility - Statement elicited through cross-examination of accused - Whether flawed - Whether questions asked incriminating - Whether inadmissible in evidence - Dangerous Drugs Act 1952 s. 37A*

The accused was charged with an offence under s. 39B(1) of the Dangerous Drugs Act 1952 ('the Act') for trafficking in 634.58 grams of cannabis. At the end of the prosecution's case, evidence had been led which showed that: (i) the drugs were discovered when the police raided the house the accused and his wife ('Hazilla') were staying in; (ii) 13.58 grams of the drugs were found from a pocket of the accused, while 621 grams were from cooking pots in the kitchen of the house; and (iii) a cautioned statement had been recorded from the accused by SP11, *albeit* that part of it was obtained through cross-examination of the accused. The facts further showed that the prosecution had not been able to trace the whereabout of Hazilla, and no evidence, therefore, was forthcoming from her in court. The defence had challenged the sufficiency of the evidence adduced, and the admissibility of the cautioned statement, and in the circumstances, questions arose before the learned judge herein as to: (ii) whether the evidence adduced could *prima facie* support a charge of trafficking under s. 39B(1) of the Act; and (ii) whether the cross-examination of the accused by SP11 had so vitiated the cautioned statement as to render it inadmissible in evidence.

Held (amending charge to one of possession):

[1] The questions asked by SP11 were unfriendly and were asked with naked intent. It was evident that the questions asked could not have been intended to clarify ambiguity, for they did not relate to what the accused had allegedly said. (p 535 f-g)

[1a] The first question (whether the accused was the owner of the drugs) was a blatant interrogation, while the second and third questions that followed (as to his knowledge of the drugs and the occupants of the house) could not have been anything else but to fortify the alleged fact of exclusive possession. The intent clearly was to incriminate the accused. The fourth question (whether he was telling the truth) could only appear to have been intended to wrap up the case against the accused. Suffice to say that improper questions were asked and the answers thereto could not therefore be admitted in evidence. (p 535 h & 536 a)

[1b] That the accused was interrogated and/or cross-examined evinced that the accused was put under pressure or coercion. This must have weakened the case for the admission of the rest of the statement. If the accused could be interrogated and cross-examined after the narrative, there could be no assurance that he would not have been interrogated and/or cross-examined before the narrative. The alleged cautioned statement therefore could not be admitted in evidence. (p 536 b-c)

[2] There was no evidence that the accused was in custody or control and/or in possession of the drugs found hidden in the cooking pots. The fact of the matter was that there were two adults in physical possession of the house and both had access to the kitchen. Either one of them could have had custody and/or control of the drugs found hidden in the cooking pots. On the facts, it could not therefore be inferred that the drugs in the cooking pots belonged to the accused and to no one else. (p 536 g)

[2a] The only sure evidence was that the accused had unlawful possession of 13.58 grams of cannabis. The charge was accordingly amended to one of possession of 13.58 grams of cannabis, an offence punishable under s. 6 of the Act, to which amended charge the accused had pleaded guilty and was sentenced to 4 years' imprisonment. (p 537 b)

[Order accordingly.]

Case(s) referred to:
Cheng Seng Heng & Ors v. PP [1949] 15 MLJ 175 ***(refd)***
Choo Chang Teik v. PP [1991] 3 CLJ 2387 SC ***(refd)***
Mok Choon v. PP [1949] 15 MLJ 179 ***(refd)***
PP v. Ahmad Rashdan Shamsher [1994] 239 MLJU 1 ***(refd)***
PP v. Michael Anayo Akabogu [1995] 4 CLJ 79 HC ***(refd)***
R v. Lim Ah Seng [1932] MLJ 12 ***(refd)***
R v. Santokh Singh [1933] MLJ 178 ***(refd)***
Sia Soon Suan v. PP [1966] 1 MLJ 116 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 6, 37A, 39B(1)

For the prosecution - Haslinda Abu Bakar DPP
For the accused - Mohd Yamin Hj Ismail; M/s Mohd Yamin Ismail & Partners

Reported by WA Sharif

JUDGMENT

Jeffrey Tan J:
The charge against the accused reads as follows:

> Bahawa kamu pada 4.10.2000 jam lebih kurang 8.15. pagi di rumah No. 159, Jalan Tongkang Pecah dalam Daerah Batu Pahat, telah didapati mengedar dadah berbahaya jenis cannabis seberat 634.58 gram, dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

At the close of the prosecution case, the court amended the charge to one of possession of 13.58 grams of cannabis, for the simple reason that exclusive possession of the rest of the cannabis stated in the charge had not been proved on a *prima facie* basis against the accused.

The prosecution summoned 11 witnesses who testified to the following. At 6 a.m. on 4 October 2004, Inspector Ng Yan Kun (SP6) received information relating to the presence of drugs at 159, Jalan Tongkang Pecah (159). SP6 immediately organised a police party to raid that house. In his briefing, SP6 instructed Corporals Azman bin Mujid (SP9) and Basiron bin Hashim, and Lance-Corporal Mohd Noor bin Abdul Hamid to follow him to enter 159 through the front door. SP6 instructed Lance-Corporals Sulaiman bin Othman (SP8) and Jasmi bin Jurin to station themselves on the left and right of the rear of 159. SP6 and his men reached 159 at about 8.15 a.m. 159 consisted of 2 individual units, and had 2 front doors, one for the unit on the left and one for the unit on the right. The unit on the left was occupied by the accused

who had rented it from SP5 who occupied the unit on the right. The left door was shut. The lights inside were switched on. SP6 knocked on the left door and identified himself. SP6 peered through the louvers at the side of the left door and saw the accused coming out of a room "dalam keadaan tergesa-tergesa. Jarak masa lepas ketuk dan melihat lelaki itu adalah beberapa saat sahaja" (see p. 18 of the notes of proceedings). SP6 pushed the door. The door opened. The door was shut but not locked. SP6 and his party entered through the left front door. SP6 apprehended the accused at the guest hall near the bedroom door. According to SP6, "OKT menunjukkan ketakutan semasa di tahan". According to SP8, "reaksi OKT macam takut." SP6 searched the accused. SP6 found a packet of a compressed block of a dried plant material (P5S) in the right pocket of the shorts worn by the accused. The accused was shirtless. SP6 took possession of that packet of plant material. SP6 then entered the bedroom. In the bedroom were Hazilla bte Keling, a year old infant and a baby. Nothing incriminating was found in the bedroom. SP6 then conducted a search of the kitchen in the presence of the accused, Hazilla bte Keling, and the rest of the police party. On the floor beneath the stove was a large metal cooking pot. Inside that large cooking pot was a smaller metal cooking pot. SP6 lifted that smaller cooking pot and found 2 blocks of a compressed dried plant material [P11B(S) & P11D(S)] wrapped in translucent plastic. Lying next to the stove were 2 knives with stains of cannabis. The kitchen door was latched from inside. According to the SP8, no one had entered or left the kitchen from the rear of the house. SP6 also recovered RM553 from the pocket of the accused, and 2 set of keys from the top of the cupboard in the guest hall. One set were the keys to car BCY 9600. SP6 entrusted the infant and baby to SP5, and then returned to the police station with the exhibits, accused, and Hazilla bte Keling. At the station, Ahmad bin Oteh attempted but failed to lift any fingerprints from the 2 blocks found in the cooking pots. It was the testimony of the government chemist (SP7 - Saupy bin Daud) that the 2 blocks of plant material [P11B(S) & P11D(S)] contained 430.4 and 190.6 grams of cannabis, and that the packet (P5S) from the pocket of the accused contained 13.58 grams of cannabis. That in essence was the sum total of the evidence of the prosecution.

The sum total would be greater had the alleged caution statement of the accused been admitted. Inspector Ramesh Nagayah (SP11) testified that on 6 October 2000 he recorded the caution statement of the accused. The prosecution then attempted to admit that alleged caution statement (ID20) in evidence, under s. 37A of the Dangerous Drugs Act 1952. But the admission of that alleged caution statement was challenged by Mr Yamin for the accused who contended that the alleged caution statement was obtained by

cross-examination of the accused. In the *voir dire* that followed, SP11 testified as follows. On 6 October 2000, he was asked by the investigation officer (SP10) to record the caution statement of the accused. At 8.30 a.m., Sergeant Ahmad bin Yasin brought the accused to his office. He ordered the handcuffs on the accused to be removed. Sergeant Ahmad removed those handcuffs and then departed, leaving him and the accused as the only persons in his office. "Saya dapati OKT ada sihat dan OKT ingin memberi percakapan dengan sukarela. Saya bacakan amaran dibawah s. 37(1)(b) dan 37A(2). Segala yang berlaku ada dirakam dan ia adalah seperti yang di rakam dalam ID20". The initial part of the caution statement was given in narrative form. After the narrative, he put 3 questions to the accused "untuk kefahaman yang lebih jelas". The caution statement was given voluntarily. SP11 was the only witness who testified at the *voir dire*.

Mr. Yamin submitted that SP11's cross-examination of the accused was not permitted, while the learned DPP contended that questions were only put to clarify the narrative of the accused.

Learned counsel cited 4 authorities to support his contention that SP11 had no right to elicit statements from the accused by means of cross-examination. In *Cheng Seng Heng & Ors v. PP* [1949] 15 MLJ 175, which concerned caution statements recorded under reg. 33 of the Emergency Regulations 1948 (a provision identical to the instant s. 37A), the Court of Appeal held:

> In 1914 it was stated by the Privy Council that the English law in regard to the admissibility of statements obtained as a result of questions put to an accused person whilst in custody was not then settled (*Ibrahim v. Rex* [1914] AC 599). Since then, however, the law has become clearer and is now embodied in Rule 7 of a Memorandum by His Majesty's Judges, commonly known as "the Judges' Rules". Rule 7 reads as follows (see *Archbold*'s 31st Edition page 372: *Stone's Justices'* Manual 79th Edition page 292):
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> > A prisoner making a voluntary statement must not be cross-examined, and no questions should be put to him about it except for the purpose of removing ambiguity in what he has actually said. For instance, he if has mentioned an hour without saying whether it was morning or evening, or has given a day of the week and day of the month which do not agree, or has not made it clear to what individual or what place he intended to refer in some part of his statement, he may be questioned sufficiently to clear up the point.

Then after having carefully surveyed the authorities, Spenser-Wilkinson J pronounced as follows:

> On the principles enunciated in the above-quoted authorities we hold that under section 33 of the Emergency Regulations the police have no right to elicit statements from accused persons by means of cross-examination or anything in the nature of cross-examination. The only safe rule to be followed when statements are being taken from accused persons by the police under Regulation 33 is Rule 7 of the Judges' Rules set out above and any departure from this rule will render the statements inadmissible in evidence.

Cheng Seng Heng was followed in *Mok Choon v. PP* [1949] 15 MLJ 179, where the only evidence against the appellant was a statement made by him to an Inspector who had cautioned him in the statutory form of the caution as then contained in reg. 33 of the Emergency Regulations 1948, and where the Court of Appeal per Willan CJ held as follows:

> This Court has already decided in the case of *Cheng Seng Heng & 4 Others v. Public Prosecutor* [1949] MLJ 175 - a digest of that case appears in (1949) MLJ 67 - that on the form of caution as it was in Regulation 33 of the Emergency Regulations, 1948, prior to the amendment on the 10th January 1949, we must be guided by English authorities regarding the admissibility in evidence of statements made to the police. The relevant English authorities consist of the Judges' Rules, to which reference was made in the case just cited, and the English decided cases.
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> Rule 3 of those judges' rules (see *Archbold*'s Criminal Pleadings and Practice, 31st ed: p. 372) reads:
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> > Persons in custody should not be questioned without the usual caution first being administered.
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> In July 1930 the Judges in England explained that Rule (see Archbold, same page) in the following terms:
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> > Rule 3 is not intended to encourage or authorise the questioning or cross-examination of a person in custody, after he has been cautioned, on the subject of the crime for which he is in custody, and, long before this rule was formulated and since, it has been the practice for the Judge not to allow any answer to a question so improperly put to be given in evidence; but in some cases it may be proper or necessary to put questions to a person in custody after the caution has been administered. For instance, a person arrested for a burglary may, before he is formally charged, say: 'I have hidden or thrown property away', and after caution he would properly be asked: 'where have you hidden or thrown it?' or a person, before he is formally charged as a habitual criminal, is properly asked to

> give an account of what he has done since he last came out of prison. Rule 3 is intended to apply to such cases and, so understood, is not in conflict with and does not qualify rule 7, which prohibits any question upon a voluntary statement except such as is necessary to clear up ambiguity.

The important words particularly applicable to the appeal now before us are those underlined, which read:

> Rule 3 is not intended to ... authorise the questioning ... of a person in custody after he has been cautioned on the subject of the crime for which he is in custody.

The position seems clear in relation to the Emergency Ordinance 1948. There can be no question upon a voluntary statement except such as is necessary to clear up ambiguity.

The position also seems clear in relation to confessions. In *R v. Lim Ah Seng* [1932] MLJ 12, where the magistrate by whom the confession was recorded had cross-examined the accused, it was held by all three learned judges (Sproule Ag CJ Thorne and Terrell JJ) that the accused could not be interrogated. Sproule Ag CJ held that the confession was not volunteered and was vitiated by what amounted to unfriendly and improper cross-examination. Sproule Ag CJ opined that "the only questions which may be lawfully propounded in such cases are those that tend merely to assist the prisoner by making his meaning clearer; always presupposing that his statement is not only voluntary but volunteered". Thorne J held that the magistrate should refrain from asking further questions of the accused other than such as may be necessary to explain any statement he makes, or to ensure that the magistrate correctly understands what the accused has said, and that the set of questions was in the nature of cross-examination and was improper. Terrell J held that "the putting of questions does not of itself render a statement inadmissible but it is obvious that if questions are put by way of cross-examination, the voluntary nature of the statement is immediately lost'. However in *R v. Santokh Singh* [1933] MLJ 178, where the magistrate by whom the confession was recorded had put questions to the appellant, it was held by the Court of Appeal (Murison CJ Burton and Whitley JJ) that the character of the statement as voluntary was not lost merely because it was made in the process of question and answer. Murison CJ held that "the correct view of the law ... is that questions may be asked so long as there is no threat or inducement", but nonetheless agreed that cross-examination is a form of threat or inducement. Burton J pointedly disagreed with *Lim Ah Seng* that a confession must be volunteered to be voluntary. Whitley J agreed with the view of Burton J that a confession

not obtained by inducement should not be invalidated. Still, both *Lim Ah Seng* and *Santokh Singh* agreed that cross-examination is improper. There can be questions only to clear ambiguity.

The questions that followed the alleged narrative of the accused were the following:

S: Adakah ganja yang di rampas Polis kepunyaan kamu?

J: Ya saya punya.

S: Adakah isteri kamu tahu kamu ada menyimpan ganja di dalam periuk dalam rumah kamu?

J: Dia tidak tahu kerana dia baru balik ke rumah saya pada petang 3/10/2000 kerana dia berada di rumah emaknya selepas bersalin dan dia masih dalam pantang hari ke 21. Pada pagi semasa saya potong dan simpan itu, isteri saya sedang tidur.

S: Adakah orang lain berada di rumah kamu selain dari kamu dan isteri kamu?

J: Tidak ada

S: Adakah kamu bercakap benar?

J: Ya benar

S: Adakah apa-apa yang hendak kamu cakap lagi?

J: Tidak

It was evident that all questions were unfriendly and were asked with naked intent. The 1st question asked the accused if he were the owner of the drugs in the house. The 2nd question asked the accused for information and or an answer on the knowledge of his of those drugs in the house, while the 3rd question asked the accused for information and or an answer on the occupants of the house. But those questions could not have been intended to clarify ambiguity, for they did not relate to what the accused had allegedly said. The 1st question was blatant interrogation, while the 2nd and 3rd questions that followed could not have been anything else but to fortify the alleged fact of exclusive possession. The intent was to incriminate the accused. And the 4th question - are you telling the truth? - could only appear to have been intended

to wrap up the case against the accused. Suffice it to say that improper questions were asked, and the answers could not be admitted. But it was not safe to admit the rest of the statement. Interrogation is a form of pressure. Cross-examination is a technique of coercion. That the accused was interrogated and or cross-examined evinced that the accused was put under pressure or coercion. And unfortunately, that weakened the case for the admission of the rest of the statement. For if the accused could be interrogated and cross-examined *albeit* after the narrative, then there could be no assurance that the accused would not have been interrogated and or cross-examined before the narrative. Given that SP11 had interrogated the accused, it was just not safe to admit the rest of the caution statement. The alleged caution statement was therefore not admitted in evidence.

The alleged witness statement of the wife of the accused was also not admitted in evidence. When recalled, SP10 testified that he could not trace Hazilla bte Keling, despite all his attempts to reach her at three different addresses and by advertisement in the local newspapers. SP10 testified that he on 12 October 2000 had recorded a statement from the wife of the accused. But that statement could not be admitted in evidence; s. 32(1)(j) of the Evidence Act 1950 had not been satisfied (see *PP v. Michael AA* [1995] 4 CLJ 79 HC).

In the end, all that the prosecution had to show for it were the oral testimony of the officers who raided 159 and the drug exhibits to prove the charge. But that was not enough for a *prima facie* case. The charge alleged that the accused was trafficking in cannabis, a dangerous drug. The first ingredient of the offence is trafficking (*PP v. Ahmad Rashdan Shamsher* [1994] 239 MLJU 1). 'Trafficking' is defined in s. 2 of the Act to include, "the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying, or distributing any dangerous drug." But there was no evidence of any one such activity. There was no evidence that the accused was in custody or control and or in possession of the drugs found hidden in the cooking pots. The fact of the matter is that there were 2 adults in physical possession of 159, and both had access to the kitchen. Either one of them could have had custody and or control of the drugs found hidden in the cooking pots. And that possibility could not be ruled out in the absence of evidence that the accused had exclusive use and or possession of the kitchen. That the accused was found in actual physical possession of 13.58 grams of cannabis raised strong suspicion that the rest of the drugs in 159 therefore belonged to the accused. But suspicion cannot take the place of evidence. On the facts, it could not be irresistibly inferred that

the drugs in the cooking pots belonged to the accused and to no one else. In any event, this is a trial of an offence involving capital punishment and evidence by inference alone is not enough to support a conviction (*Choo Chang Teik v. PP* [1991] 3 CLJ 2387). Irrespective of whether a court is convinced in its mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else (see *Sia Soon Suan v. PP* [1966] 1 MLJ 116). The only sure evidence was that the accused had unlawful possession of 13.58 grams of cannabis. The charge was accordingly amended to one of possession of 13.58 grams of cannabis, an offence punishable under s. 6, to which amended charge the accused pleaded guilty and was sentenced to 4 years imprisonment with effect from the date of his arrest.